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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 631

ROBERT MURRAY MCINTOSH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court rendered no opinion (see Pet. App. 19). The opinion of the Court of Appeals (Pet. App. 15) is reported at 295 F. 2d 504.

JURISDICTION

The judgment of the Court of Appeals was entered on November 1, 1961 (Pet. App. 14). The petition for a writ of certiorari was filed on December 23, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's suit under the Federal Tort Claims Act, 28 U.S.C. 1346(b), was properly dismissed by the district court on the ground that the allegedly negligent acts and alleged wrongs are not actionable because: (a) they occurred more than two years prior to the commencement of suit; (b) they occurred while petitioner was on active military service and were incident to that service; or (c) they fall within express exceptions embodied in the Act.

STATUTES INVOLVED

The Federal Tort Claims Act provides in pertinent part as follows:

28 U.S.C. 1346(b):

> [T]he district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2401(b):

> A tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues * * *.

28 U.S.C. 2680:

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.
>
> * * * *
>
> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

STATEMENT

Petitioner instituted this action for damages under the Federal Tort Claims Act, 28 U.S.C. 1346(b), on June 15, 1960 (Pet. App. 16). The complaint made several allegations of negligent or otherwise wrongful conduct on the part of government employees. These allegations can be divided into four general categories:

(1) *United States Army.* Petitioner alleged that in 1953, while he was in the Army and stationed in Korea and Japan, he was negligently diagnosed "as a mental case," treated with dope injections and otherwise, improperly exposed to radio programs and

movies, refused correct information, and retained in locked wards at various Army hospitals (Pet. App. 16-17).

(2) *Army discharge.* Petitioner alleged that he was "improperly and negligently discharged" from the Army on December 28, 1953, "by reason of mental disorders" (Pet. App. 17).

(3) *Veterans Administration.* Petitioner alleged that in 1955, when he was treated at a Veterans Administration hospital, he was negligently diagnosed as one hundred percent mentally disabled, informed that he had stated that he would kill himself, and "retained against his consent after he had demanded his release in writing," and then "negligently released" (Pet. App. 17).

(4) *Army retirement.* Petitioner alleged that on January 30, 1959, he was "negligently retired from the army by reason of physical disability" [1] upon the negligent recommendation of the Army Board for Correction of Military Records and after the Board "failed" to give petitioner notice of a hearing and to permit him to attend the hearing (Pet. App. 18).

The government moved for dismissal of the complaint on the ground that (1) the claims are not covered by the Federal Tort Claims Act in that they fall within the explicit exceptions for acts taking place in a foreign country, or constituting assault, battery, and false imprisonment, or based upon the exercise of a discretionary function, 28 U.S.C. 2680(a), 2680(h), 2680(k); (2) the claims arising out of acts

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[1] Petitioner was retired as a first lieutenant (Pet. App. 18).

allegedly committed before June 15, 1958, are barred by the two-year limitations period of 28 U.S.C. 2401 (b); and (3) the claims arising out of acts occurring while petitioner was in the United States Army arose out of or in the course of activity incident to military service and are therefore outside of the coverage of the Act (R. 8).

The District Court, noting the grounds stated in the government's motion to dismiss, ordered the dismissal of the complaint (Pet. App. 19). In so doing, the court held that "this court does not have jurisdiction to hear and determine the alleged cause of action in this controversy" (Pet. App. 19). The Court of Appeals affirmed in a *per curiam* order (Pet. App. 15).

ARGUMENT

The action of the court below in affirming the district court's dismissal of petitioner's complaint clearly accorded with well-settled law and calls for no review by this Court.

1. It is established that "[s]uits against the United States can be maintained only by permission, in the manner prescribed and subject to the restrictions imposed." *Munro* v. *United States*, 303 U.S. 36, 41; see also *Soriano* v. *United States*, 352 U.S. 270, 273-75. One restriction imposed by Congress on its grant of jurisdiction to district courts to entertain tort actions against the United States is that these actions be commenced within two years of their accrual. 28 U.S.C. 2401(b). Any action not commenced within this period is "forever barred" and outside the juris-

diction granted district courts under the Federal Tort Claims Act. See *Humphreys* v. *United States*, 272 F. 2d 411 (C.A. 9); *Tessier* v. *United States*, 269 F. 2d 305 (C.A. 1); *Compagnie Generale Transatlantique* v. *United States*, 51 F. 2d 1053 (C.A. 2); cf. *Soriano* v. *United States*, 352 U.S. 270, 273-75.

Petitioner alleges that he was injured by actions of Army medical personnel in Korea and Japan in 1953, by his discharge from active duty with the Army in 1953, by medical employees of the Veterans Administration in 1955, and by his retirement from the Army in January 1959 upon a recommendation of the Army Board for Correction of Military Records in August 1958 (Pet. App. 16-18). It is apparent that all of petitioner's claims, except those referring to the action of the Board for Correction of Military Records and his subsequent retirement, accrued more than two years before the commencement of this action on June 15, 1960 (Pet. App. 16), and are therefore barred by the two-year limitation period of 28 U.S.C. 2401(b).

2. This Court held in *Feres* v. *United States*, 340 U.S. 135, 146, that the United States is not liable under the Tort Claims Act to servicemen for injuries or death that "arise out of or are in the course of activity incident to service." Many of the wrongs of which petitioner complains occurred while he was in the Army in Korea. He developed symptoms that led to his being treated by Army doctors in what was apparently the combat zone. He was then transported to Japan for further treatment by Army doctors and

other medical personnel. It was during the course of this treatment both in the combat area and in Japan that, he alleges, he suffered injuries for which he now seeks compensation. The "service-incident" nature of these injuries (see Pet. App. 16-17) is beyond question.

3. Several of the express exceptions embodied in the Tort Claims Act (28 U.S.C. 2680) serve as a further bar to the maintenance of petitioner's suit.

He asserts (Pet. App. 17) that he was wrongfully committed to locked wards of Army hospitals and that he was retained against his will in a Veterans Administration hospital. This amounts to a charge that he was falsely imprisoned, a tort excepted by 28 U.S.C. 2680(h) from the waiver of sovereign immunity embodied in the Tort Claims Act. See *Klein* v. *United States*, 268 F. 2d 63 (C.A. 2), affirming 167 F. Supp. 410 (E.D. N.Y.). He also alleges that various negligent and wrongful acts were committed against him while he was in the Army and stationed in Korea and Japan (Pet. App. 16-17). His claim based on these alleged wrongs arose "in a foreign country" and is, therefore, barred by the terms of 28 U.S.C. 2680(k). See *United States* v. *Spelar*, 338 U.S. 217; *Burna* v. *United States*, 240 F. 2d 720 (C.A. 4); *Callas* v. *United States*, 253 F. 2d 838 (C.A. 2); *Orion Shipping and Trading Co.* v. *United States*, 247 F. 2d 755 (C.A. 9); *Cobb* v. *United States*, 191 F. 2d 604 (C.A. 9).

Finally, petitioner claims that he was injured by the Army's negligently discharging him from active duty status as an officer in 1953 and its subsequent

negligence in retiring him in 1959 (Pet. App. 17, 18). These actions of the Army, even if done negligently, are not reviewable in a Tort Claims suit, because they fall within 28 U.S.C. 2680(a), which excludes from the coverage of the Act any claim "based upon the exercise [of] * * * a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." See Sections 101, 104 of the Act of June 29, 1948, 62 Stat. 1081, 10 U.S.C. (1952 ed.) 580, 583, now codified as 10 U.S.C. 3784; 10 U.S.C. 1201, 1206; *Creary* v. *Weeks*, 259 U.S. 336; *Orloff* v. *Willoughby*, 345 U.S. 83.

4. Moreover, it is apparent that any damages sought for petitioner's discharge or retirement from active duty would be in lieu of the pay and allowances to which he would be entitled while on active duty less the pension which he has received on retirement. Yet Congress has specifically decreed that "The district courts shall not have jurisdiction" (under the Federal Tort Claims Act or otherwise) "of (1) Any civil action or claim for a pension; (2) Any civil action to recover fees, salary, or compensation for official services of officers or employees of the United States." 28 U.S.C. 1346(d). See *Burrell* v. *Martin*, 232 F. 2d 33 (C.A.D.C.); *Angilly* v. *United States*, 199 F. 2d 642 (C.A. 2); *Hunter* v. *United States*, 183 F. 2d 446 (C.A. 4).[2]

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[2] Petitioner also alleges certain irregularities in his retirement process (Pet. App. 18). A tort action in the District Court for the Eastern District of South Carolina is neither the action nor the place to obtain review of such matters. If these matters are subject to review at all, see *Harmon*

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1962.

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v. *Brucker*, 355 U.S. 579, it would appear that it would be only in an action for extraordinary relief against the Secretary brought in the District Court for the District of Columbia or for back pay in the Court of Claims. *Hunter* v. *United States*, 183 F. 2d 446 (C.A. 4).

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